

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

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MAR - 1 1996

FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF SECRETARY

In the Matter of)

Revision of Part 22 and Part 90)
of the Commission's Rules to)
Facilitate Future Development)
of Paging Systems)

WT Docket No. 96-18

Implementation of Section 309(j))
of the Communications Act --)
Competitive Bidding)

PP Docket No. 93-253

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COMMENTS OF THE PAGING COALITION
ON INTERIM PAGING LICENSING PROCEDURES

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SUMMARY

The Paging Coalition, a group of common carrier and exclusive private carrier paging carriers, has several concerns about the interim licensing procedures proposed in the Notice of Proposal Rulemaking in the above-captioned proceeding. The Coalition opposes the freeze on acceptance of applications for paging channels imposed by the NPRM, including the Commission's refusal to accept applications delivered to the frequency coordinator prior to the NPRM, given the immediate harmful impact of these actions on bona fide licensees and small businesses. The freeze will prevent these licensees from making necessary expansions and modifications to their systems for what is likely to be more than a year, severely disrupting their ability to serve their public subscribers, and threatening the financial viability of smaller carriers. Given the Commission's acknowledgement that there is little available spectrum to be auctioned to new entrants, the stifling impact of the freeze is completely unjustified.

The Coalition urges the Commission to adopt reasonable expansion rights for existing licensees. Paging systems must be expanded and modified on an ongoing basis in order to meet customer demand. While the Commission has recognized this fact, its protections for incumbent licensees fall short of accommodating their needs. Secondary licensing is not a viable alternative, since carriers cannot risk the loss of investment and disruption of service that can occur when secondary operations are forced off the air.

The Coalition also opposes the adoption of a revised interference protection standard for 900 MHz, without the required notice and comment rulemaking.

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Blooston, Mordkofsky, Jackson & Dickens, on behalf of its common carrier and exclusive private carrier paging clients listed in Attachment A hereto (hereinafter "the Paging Coalition" or "the Coalition") hereby submits their comments on the interim paging licensing procedures, as requested in the Commission's February 9, 1996 Notice of Proposal Rulemaking (NPRM) in the above-captioned proceeding. As set forth below, the Coalition opposes the freeze on acceptance of applications for paging channels imposed by the NPRM, including the Commission's refusal to accept applications delivered to the frequency coordinator prior to the NPRM, given the immediate harmful impact of these actions on bona fide licensees and small businesses. The Coalition also urges the Commission to adopt reasonable expansion rights for existing licensees. Moreover, the Coalition opposes the adoption of a revised interference protection standard for 900 MHz, without the required notice and comment rulemaking. Finally, the Coalition takes issue with the

Commission's Initial Regulatory Flexibility Analysis, which ignores the severe impact that the market area licensing proposal in general, and the interim licensing procedures in particular, will have on small and medium-size businesses.

I. STATEMENT OF INTEREST.

The Coalition is made up of paging carriers holding licenses in the VHF, 929 and 931 MHz bands, all of whom are attempting to provide the best possible service to the public in a very competitive marketplace. All of these carriers have experienced delays of varying lengths, trying to obtain licenses to establish and fill in the footprint of their systems, so as to improve the coverage of their service in response to the demands of their customers. All of these carriers have made substantial investments in developing their paging systems, with some investing millions of dollars in these ventures. All will be adversely affected by the delay and regulatory uncertainty which will result from the Commission's interim licensing proposal in this proceeding. Most of the members of the Coalition have pending at the Commission applications to expand their paging coverage, many of which will be jeopardized by the Commission's retroactive freeze policy.

II. THE COMMISSION SHOULD ELIMINATE ITS FILING FREEZE.

At the Commission's February 8, 1996 open meeting, Commissioners Chong and Quello expressed their opposition to a filing freeze. Commissioners Ness and Chong have both stated for the record that the market area licensing rulemaking should not prevent

existing carriers from continuing to expand or modify their facilities in order to meet customer demand.¹ Chairman Hundt similarly indicated that the industry concerns about the harmful impact of a paging freeze "had been heard" by the Commission, suggesting that these concerns would be given consideration. Despite the apparent concurrence by a majority of the Commissioners that a paging freeze would have adverse consequences which should be avoided, the Commission imposed a freeze on all applications for paging channels. NPRM at para. 139.

To make matters worse, the NPRM makes the freeze retroactive, by holding in abeyance any application for which the period for filing competing applications has not expired. NPRM at para. 144. If the Commission's auction procedure is adopted, these applications will be dismissed. Id. This freeze will only worsen the harm caused by delays in the processing of paging applications, which have tied the paging industry up in knots for the better part of two years. Given the Commission's recognition that there is little spectrum left to auction for new entrants, NPRM at para. 13, future licensing should be structured to accommodate the needs

¹ See NPRM, Separate Statement of Commissioner Ness at p.1 ("[W]e are taking measures that will allow existing paging businesses to continue to meet customer demand during the pendency of this proceeding without undermining our objectives.... Paging is a thriving industry with established licensees who must regularly expand or modify their facilities in order to meet customer demand and increase their competitiveness in the market."); NPRM, Separate Statement of Commissioner Chong at p.2 ("In crafting our decision to manage a smooth transition, I have been very mindful that we do not inadvertently hinder the ability of paging carriers to either compete or continue to expand their businesses.").

of existing carriers and their public subscribers. The freeze turns this priority on its ear.

A. THE FREEZE WILL HARM SMALL AND MEDIUM-SIZE CARRIERS.

All paging licensees and their public subscribers will suffer from being unable to apply for and receive authority to expand and modify their paging services in a timely fashion. However, the impact will be most severe on small and medium-size paging providers -- including the very entities for which Congress has mandated safeguards, in order to ensure their participation in the wireless marketplace. See, e.g., Section 309(j) of the Communications Act of 1934, as amended.²

These carriers will be unable to effectively compete if they cannot implement needed modifications and expansions during the several months that it will take to resolve the instant rulemaking and commence auctions. Indeed, the processing of 931 MHz applications has already been delayed for nearly two years, while the Commission has attempted to implement software processing of backlogged applications. Small paging carriers, and even medium-size carriers which have not had an opportunity to implement a substantial portion of their needed coverage, may not survive

² These protections were implemented by the Omnibus Budget Reconciliation Act of 1993, Pub. L. No. 103-66, Title VI s6002(b) (2)(A), (B), 107 Stat. 312 (amending 47 U.S.C. s309 et seq.). Specifically, Congress was concerned that "unless the Commission is sensitive to the need to maintain opportunities for small businesses, competitive bidding could result in a significant increase in concentration in the telecommunications industries." H.R. Rep. No. 111, 103d Cong., 1st Sess. 254 (1993).

another series of delays in the processing of applications for 931 MHz or other paging bands.

Congress and the Commission have long recognized that small businesses make up an important element of the U.S. economy.³ Congress has passed legislation designed to protect small businesses, because of their contributions to universal service and their role in the economy. By imposing an undue burden on small carriers, the Coalition believes that the freeze would frustrate the Congressional goals underlying this legislation.

Congress passed the Regulatory Flexibility Act, Pub. L. No. 96-354, 194 Stat. 1164 (1980), for the reason that "unnecessary regulations create entry barriers in many industries and discourage potential entrepreneurs from introducing beneficial products and processes." Section 2(a)(5). In passing this legislation, Congress found that the harmful effect of unnecessarily burdensome Federal Regulations on small businesses does not serve the public interest.⁴ Because the freeze would disproportionately impact

³ Little more than a decade ago, small businesses produced 43% of the Gross National Product and provided 55% of the nation's jobs. "[B]etween 1969 and 1976, small business created almost two thirds of all new jobs in the national economy." Regulatory Reform: Hearings Before the Subcommittee on Administrative Practice and Procedure of the Senate Committee on the Judiciary, Part 3, 96th Cong., 1st Sess. 343, 344-45 (1979). (Small Business: A Critical Element of the American Economy, Remarks of Alfred Dougherty, Jr., Director, Bureau of Competition, Federal Trade Commission) [hereinafter "Dougherty Remarks"]. In the communications industry, small businesses are the largest provider of rural telecommunications, especially in those places where larger carriers find that the population and the terrain do not justify their investment.

⁴ "The public interest lies directly in two areas: (1) the disproportionate impact of governmental regulation on small businesses reduces the competitive capacity of small business,

small businesses by causing them to curtail or discontinue radio services to the public, the Coalition submits that the Commission's freeze would contravene the legislative policy underlying the Regulatory Flexibility Act by decreasing competition in the market place.

The Commission includes the required Initial Regulatory Flexibility Analysis as Appendix A of the NPRM. Therein, the Commission concludes that its competitive bidding proposals "are expected to benefit small entities.... The proposed changes to Commission rules also will increase the flexibility of small businesses and lessen the administrative burden on small entities." Id. at p.2. The Coalition must take issue with these conclusions. Small business members of the Coalition, such as Ventures in Paging, will not be able to afford to bid on the entire license for the major trading area (MTA) in which they are located. Instead of gaining flexibility, such small businesses will lose the flexibility to define their own area of operation. More importantly, the freeze will make it difficult if not impossible for small licensees to complete the buildout necessary for them to provide a reliable paging service. Small businesses are not in a position to apply for and construct their entire system all at once. Instead, budgetary considerations and other factors require

thereby placing Government in the strange position of encouraging economic concentration, and (2) consumers, to a large extent, must pay the cost of regulation in the form of higher prices. Thus, while the most immediate and visible impact may fall to the small [business], the public shares the burden" in the form of higher prices. 126 Cong. Rec. 24,575, 24,588.

a more gradual buildout. The freeze will interrupt this buildout at a critical time, delaying by several months the completion of a system which substantially meets customer-requested coverage areas. Therefore, the interim rules will increase the administrative burden on small businesses.⁵

The Commission recognizes that there is little unlicensed spectrum left and few opportunities for new carriers. The overriding public interest in allowing smaller paging licensees to improve existing service to the public outweighs any benefit gained from the freeze.

B. THE RETROACTIVE NATURE OF THE FREEZE IS UNWARRANTED.

The courts generally look with disfavor on retroactive application of administrative regulations and policies. See, Bowen v. Georgetown University Hospital, 488 U.S. 208 (1988).⁶ The Commission must balance the mischief caused by retroactive rules and policies against the beneficial effects, if any. See Yakima Valley Cablevision, 794 F.2d 737, 745-46. The retroactive freeze adopted by the NPRM fails to satisfy this balancing test. The Commission's decision to hold (and eventually dismiss) applications which have not been on Public Notice for the requisite period of time will

⁵ The Coalition contemplates filing separate comments more fully addressing the entire Initial Regulatory Flexibility Analysis, as instructed by Appendix A. The above comments are provided because they relate to the impact of the interim rules on small businesses.

⁶ See also, Yakima Valley Cablevision v. FCC, 794 F.2d 737, 745 (D.C. Cir. 1986) ("Courts have long hesitated to permit retroactive rulemaking and noted its troubling nature.")

jeopardize hundreds of applications filed by legitimate carriers, who are trying to serve the demands of their customers.

The Commission justifies its retroactive freeze by stating that "this approach gives the appropriate consideration to those applicants who filed applications prior to our proposed changes and whose applications are not subject to competing applications." NPRM at para. 144. However, applications submitted on or before February 8, 1996 (the NPRM adoption date) were clearly not filed in response to the Commission's market area licensing proposal, so concerns about speculative filings are not warranted. Thus, there is no valid reason to freeze such applications, even if they are not past the deadline for competing filings. Assuming arguendo that a prospective freeze is valid and justified, any potential competing applicants cannot complain if they have not yet filed their competing proposals.⁷

This is especially true for 931 MHz applicants, since they are not entitled to apply for any particular frequency.⁸ Instead, the Commission grants 931 MHz applicants the next available channel, while honoring frequency preferences on a first-come, first-served basis. Mutual exclusivity arises only when there are more

⁷ Of course, as discussed above, the Coalition does not believe the freeze is justified.

⁸ The Commission had adopted rules that changed its unrestricted 931 MHz licensing scheme. See Revision of Part 22 of the Commission's Rules Governing the Public Mobile Services, Report and Order, CC Docket No. 92-115, 9 RCC Rcd 6513 (1994) ("Part 22 Rewrite Order"). However, the Commission stayed its new rules providing for frequency specific licensing of 931 MHz channels by Order, 10 FCC Rcd 4146 (January 18, 1995) ("Part 22 Stay Order").

applicants than available channels, in a given area. Thus, the traditional concept of mutual exclusivity does not translate as readily in 931 MHz -- rather than filing against a particular application which has been on public notice, you are filing against the availability of non-specific channels. Similarly, 929 MHz frequency coordination generally assigns frequencies on an as available basis, unless the applicant is an existing licensee seeking to expand its system.

More importantly, the vast majority of applications which would be held in abeyance due to the retroactive effect of the freeze are non-mutually exclusive applications filed by existing licensees seeking to expand or modify their systems. The harm in delaying (or in some cases completely preventing) such needed system improvements far outweighs any benefit in dismissing applications because the filing window for competing proposals has not expired. See Yakima Valley Cablevision, supra, 794 F.2d at 745-46.

**C. THE COMMISSION SHOULD ACCEPT APPLICATIONS
WHICH WERE FILED WITH PCIA BEFORE THE FREEZE.**

The Commission has indicated that it will not accept applications which were already submitted to the Personal Communications Industry Association (PCIA) for frequency coordination, but which were not actually received by the Commission before the adoption of the freeze. This action unjustly strands numerous bona fide applications which were submitted to the frequency coordinator in

a timely fashion, but which did not reach the Commission on or before February 8, 1996.

If the freeze is not lifted altogether, the Commission should accept any application which was in the hands of PCIA prior to the freeze. PCIA executes its coordinator function as the appointed agent of the Commission. See Report and Order, Frequency Coordination in the Private Land Mobile Radio Service, PR Docket No. 83-737, 103 FCC 2d 1093 (1986). The frequency coordinator was appointed to carry out portions of the Commission's licensing function, in order to save Commission resources and improve application processing. Id. Therefore, applications submitted to PCIA should be viewed as having been filed with the Commission. This is especially true since the Commission requires frequency coordination, 47 CFR s90.175, and the applicants have no control over how long the coordination process will take once their applications have been delivered to PCIA.

D. THE FREEZE IS UNFAIR AND ADVERSE TO THE PUBLIC INTEREST.

Administrative fairness dictates that the Commission process any applications for paging facilities that were either on file or delivered to the frequency coordinator on or before February 8, 1996. These applicants followed the Commission's rules, hired engineers and attorneys to prepare their applications, obtained site availability, and paid a filing fee to the Commission. But for government shutdowns due to snow and the budget crisis, many of these applications may have been on public notice long enough

for the competing application window to have closed prior to February 8, 1996.

E. THE COMMISSION SHOULD CLARIFY THAT THE FREEZE DOES NOT APPLY TO UHF AND VHF CONTROL LINK APPLICATIONS.

The NPRM does not clearly address the issue of whether the freeze applies to applications for UHF and VHF band control links. On the one hand, paragraph 139 indicates that "we are suspending acceptance of new applications for paging channels," which could be interpreted as applying to any application for UHF or VHF channels allocated under Part 22 (and therefore available for paging), even if the application proposed a control link operation. On the other hand, paragraph 157 indicates that "applications for paging licenses ... received after the adoption date of this Notice will be held in abeyance." This language suggests that the freeze applies only to "paging applications," i.e., applications which propose paging facilities. Thus, control link applications would not be affected by the freeze. The Commission should confirm that the latter is the case. The Commission made the UHF and VHF channels previously allocated for Improved Mobile Telephone Service (IMTS) available for control link use, and has recognized the urgent need for control frequencies to be used in connection with paging operations. See e.g., Second Report and Order, CC Docket No. 87-120, 4 FCC Rcd 6415, 6416-17 (August 18, 1989) ("Control frequencies are essential for modern paging systems.... The acute shortage of control channels has been clearly demonstrated."). There is nothing in the record indicating that this acute need for

control frequencies has diminished. To the contrary, the explosive growth of the paging industry and significant licensing of paging operations since 1989 has only increased the need for control channels. Appropriate safeguards can be adopted to ensure that the availability of these frequencies for control operations is not abused, such as requiring these applicants to show that their control facility is configured to use a directional antenna and only as much power as is needed to accomplish the control link, and precluding control operations licensed after the NPRM from converting to paging or other use of the frequencies.

**III. EXISTING LICENSEES SHOULD BE ALLOWED TO FILE
EXPANSION, RELOCATION AND MODIFICATION APPLICATIONS,
EVEN IF THE FREEZE IS NOT LIFTED.**

The Commission recognizes that "an across-the-board freeze could impair the ability of existing licensees to make certain necessary modifications to their systems to respond to consumer demand while the rulemaking is pending." NPRM at para. 140. The Commission offers two measures to prevent this recognized harm, namely: (1) allowing incumbent licensees to implement additional transmitters without Commission approval, so long as the composite interference contour is not exceeded; and (2) allowing licensees to file applications that would expand their interference contours, which applications would be granted on a secondary basis. NPRM at para. 143. The Coalition applauds the Commission's efforts to protect existing licensees. However, in response to Commissioner Chong's inquiry, more needs to be done to improve the transition process.

In particular, while the right to add transmitters which do not expand the system interference contour is a useful tool, it has a serious drawback for 929 and 931 MHz licensees. As discussed below, the new method of calculating the interference contour (NPRM, paras. 52 and 141) greatly reduces the area in which such additional transmitters can be located. Customer demands often dictate that transmitters be added or relocated in a way that will change the composite interference contour. Moreover, adding or relocating transmitters outside of the interference contour, on a secondary basis, is not a practical solution.

The eventual winner of the market area license will be able to force such secondary transmitters to cease operating or cause such interference to these transmitters that they will be rendered useless. Existing carriers cannot be expected to obtain applicable zoning clearances, enter into a binding site lease, erect or modify a tower, purchase and install a transmitter and antenna system, and provide a needed service expansion to its customers, only to have to shut down this station in a matter of months. Following such a course of wasted resources and customer frustration is a sure formula for bankruptcy, especially for smaller carriers.

The Coalition notes that the need to relocate transmitters is likely to increase substantially in the coming months, as an army of newly licensed broadband and narrowband PCS carriers look for prime antenna sites. Coalition members have already found that antenna space is becoming scarce, and tower owners are raising lease rates substantially in response to the increased demand.

Smaller carriers will find it especially difficult to pay such increases and may therefore have to relocate. In some cases, the tower owner simply declines to renew the lease without opportunity for negotiation.

Given the growing scarcity of available antenna sites, it will often prove impossible to obtain an alternative site that will not change the original interference contour (especially if calculated under the new formula). Other circumstances will require existing licensees to establish facilities that would extend the system interference contour, such as storm damage, zoning restrictions and construction of new buildings which impede signal propagation. More importantly, service to the public -- the primary function of any Commercial Mobile Radio Service -- dictates changes to the interference contour. Expansion of the contour is often needed to provide coverage when, e.g., an existing customer opens a new plant; or to meet competitive opportunities created by a potential customer (such as a hospital).

Accordingly, an incumbent licensee should be able to file applications for additional sites within a reasonable distance (such as 40 miles) of its existing system.⁹ Licensees should also be able to fill in gaps in their coverage that may be larger than 40 miles, where such gaps are substantially surrounded (e.g., in at least six of the light principal radials) by the licensee's co-

⁹ The 40 mile distance has a basis in the Commission's Rules: Section 22.539(a) classifies any transmitter located within 40 miles of another co-channel transmitter owned by the same licensee as being "in the same geographic area."

channel facilities. Allowing such applications would give incumbents a reasonable opportunity to expand coverage, in response to the demands of customers. And allowing incumbents to fill in gaps in coverage would best serve the public interest, since continuous coverage can be provided throughout these gaps only by these entities. Since the auction winner will have to protect the incumbent's surrounding sites, it would be able to provide only a small area of local service. The rest of the coverage gap would become a "no man's land." This would only undermine the purpose of the proposed rules. The size of the gaps that can be filled in may vary according to frequency band, but the Coalition believes that 900 MHz licensees should be able to fill in gaps of 150 miles or less (since the currently required 70-mile protection which the auction winner must afford in all directions would occupy a gap of 140 miles, leaving only 10 miles for actual coverage that the winner could provide. For lower bands, incumbents should be able to fill in gaps of 100 miles or less.

IV. THE COMMISSION SHOULD NOT REDUCE INTERFERENCE PROTECTION TO 900 MHz STATIONS.

The NPRM "proposes" a new method of calculating the interference protection to which 929 and 931 MHz band licensees are entitled. NPRM at para. 52. However, paragraph 140 suggests that the proposed standard has been adopted, retroactively.

The Commission's Rules currently protect a fixed service area for 931 MHz licensees, with the size of this area determined by the station class set forth in Rule Section 22.502. For most 931 MHz

stations, this service area is 20 miles. Likewise, 931 MHz stations have a fixed interference contour that is dictated by the station class. This contour is 50 miles for most 931 MHz stations. Because the interference contour cannot overlap the service area of a co-channel station, the current rules create a minimum mileage separation between co-channel stations that is typically 70 miles. When exclusivity was adopted for 929 MHz, similar protections were created, such that 70 miles is the required separation for most 929 MHz stations.¹⁰

The formulae set forth in paragraph 52 for calculating the service area and interference contours significantly reduce the present minimum mileage separation. The formula for calculating interference contours uses a median field strength of 21 dBuV/m, while the formula for calculating service areas is based on a median field strength of 47 dBuV/m. Based on the curves attached to the NPRM (Appendices B and C), Table A hereto shows the new service area and interference contour calculations for a range of antenna heights. The Table shows that stations operating at an antenna height above average terrain (HAAT) of 100 feet, with an effective radiated power of 1000 watts, will have a protected service area of only 4.9 miles, reduced from the current 20-mile area. The corresponding interference contour is reduced from 50 miles to 20.9 miles. At a HAAT of 200 feet, the service area is reduced to 7.5 miles and the interference contour is reduced to

¹⁰ Report and Order, PR Docket No. 93-35, 8 FCC Rcd 8318, 8339 (1993).

27.1 miles. The NPRM notes that, at 1000 feet HAAT and 1000 watts ERP, the service area approximates the current 20 mile figure. However, in the experience of the Coalition members, antenna heights above average terrain for paging facilities are generally between 100 and 300 feet.

While public comment is requested on the use of these new formulae, NPRM at para. 53, footnote 271 of paragraph 140 appears to apply the new formula for interference contours to any permissive modifications and fill-in transmitters filed after the adoption of the NPRM. The Commission should clarify whether it intended to retroactively apply the new formula.¹¹ If intended, the adoption of this standard without a rulemaking would appear to violate the Administrative Procedure Act (APA) and would be arbitrary and capricious.

Paragraph 140 of the NPRM allows existing licensees to establish "fill-in" transmitters that may cover new service area provided that such additions or modifications do not expand the interference contour of the incumbent's existing system. However, in footnote 271 the Commission states that "[t]he interference contour is based on a median field strength of 21 dBuV/m. See para. 52, supra." The Commission thereby indicates that the new interference contour formula (which is based on a median field

¹¹ Indeed, the Commission should clarify whether it intends for the 21 dBuV/m formula to apply to all paging bands. Paragraph 52 discusses this formula only as a new standard for 900 MHz. However, paragraph 140 and footnote 271 discuss all paging bands. The vague reference in footnote 271 to paragraph 52 arguably confines the adoption of the 21 dBuV/m to 900 MHz only. The Commission should clarify this ambiguity.

strength of 21 dBuV/m) is to be used when determining whether additional facilities meet the "fill-in" transmitter right created by paragraph 140. The NPRM goes on to state as follows:

Under our current Part 22 rules, such additions or modifications are allowed by common carrier paging licensees without prior Commission approval if the added site is within both existing service and interference contours. [footnote omitted] We find that the public interest is served by continuing to allow such modifications because they will give incumbents the flexibility to make internal site modifications without affecting spectrum availability to others. We also believe that it serves the public interest to exempt incumbents from the requirement that the service area not be modified so long as the licensee's interference contour is maintained. Using the interference contour as the sole basis for modification provides the same protection to other licensees as our current rules but provides a simpler analysis of determining permissible modifications.

NPRM at para. 140. This language suggests that the new formula will replace current Sections 22.163 and 22.165 of the Commission's Rules, thereby changing the way in which licensees can implement permissive modifications and fill-in transmitters.

The new interference contour formula is not appropriate for implementing fill-in transmitters under the interim licensing policy, since the industry did not license the existing systems with this new formula in mind. However, when the new formula is applied to modifications that could otherwise be constructed under the existing rules, it becomes a de facto rule change.

Because the new formula drastically reduces the interference protection for existing licensees, use of this formula in place of the current fill-in and permissive modification rules would constitute a rule change without a notice and comment rulemaking proceeding. The APA establishes a procedure which must be followed

in order for an agency to change its substantive rules. See, 5 U.S.C. s553 (1995). Unless these procedures are followed, rule changes do not have the force of law.

The Commission tries to justify its action with the following statement:

The imposition of these changes in application processing is procedural in nature and, therefore, is not subject to the notice and comment and effective date requirements of the Administrative Procedure Act (APA). [footnote omitted] ... These changes will allow incumbent licensees the flexibility to make internal site modifications during the pendency of this proceeding without interfering with any other licensees' operations or affecting the spectrum availability to future applicants. Thus we believe that these changes would be noncontroversial and unlikely to provoke public comment.

NPRM at para. 157. However, far from being "noncontroversial and unlikely to provoke public comment," the retroactive change to the permissive modification rules have an immediate and severe impact on existing licensees.

The new interference protection standard, and its impact on the permissive modification rules, constitutes adoption of a "substantive" rule (which requires compliance with the APA's notice and comment requirement). The Coalition must take issue with the Commission's above-quoted characterization of this rule change as "procedural" (and thus exempt from the notice and comment requirements). The U.S. Court of Appeals for the District of Columbia Circuit clarified the difference between procedural and substantive rules in Kessler v. FCC, 326 F.2d 673, 680 [1 RR2d 2061, 2068] (1963):

"Substantive rules are those which change standards of station assignments and procedural rules are those

dealing with the method of operation utilized by the Commission in the dispatch of its business."

The new interference contour formula clearly changes the "standards of station assignments," since it affects how close two transmitters can be located. When applied in the interim licensing context, this new standard changes the permissive modifications that licensees can make to their stations, as well.

The substantive nature of the interference standard is demonstrated by the fact that the Commission has requested comment on its proposal to redefine the 931 MHz interference contour as 21 dBuV/m. NPRM at paragraphs 52 and 53. Because the Commission has not yet taken public comment on this proposal, the immediate use of this standard is inappropriate and violates the APA. The Commission should accordingly retract footnote 271.

The Commission's improper adoption of the new interference contour standard would also appear to constitute a modification of license, in violation of Section 316 of the Communications Act of 1934, as amended. Section 316 requires the Commission to provide a licensee with notice and a hearing prior to the modification of its license. Part 22 paging licenses incorporate the terms of all relevant rules. These rules define a licensee's authority to operate, and to implement any permissive modifications.

As shown by Table A, the 21 dBuV/m standard drastically reduces the originally authorized interference contour, thereby reducing the protection to which existing licensees are entitled, and eliminating many of the modifications which could be implemented under the existing rules. By modifying these substantive

rules, the Commission has modified the licenses as well, without the required notice and hearing.

This unilateral adoption of a new standard is particularly troublesome because of investments which 900 MHz licensees and applicants have made in reliance on the existing rules. As described above, many 931 MHz paging applications have been delayed in processing for more than one year. This has forced many 931 MHz applicants to construct their systems in advance, as allowed under Rule Section 22.143, so that they will be able to implement service immediately upon grant. When constructing these stations, the applicants often incorporate permissive modifications which are needed for improved service, or because of changed conditions at the antenna site. They may install higher-powered transmitters and new antenna systems in order to improve propagation and building penetration; install filters and make other adjustments to avoid inter-modulation interference with a potentially incompatible licensee that has leased space at the site; or directionalize the signal in order to avoid new structures or unforeseen terrain problems. Up until now, such modifications could be implemented on a notification basis, as long as the station class (as defined in Rule Section 22.502) did not change. Under the 21 dBuV/m formula, many of these modifications will no longer be considered permissive; and because of the filing freeze, newly granted licensees would not even be able to apply for authority to implement the changes. This result works an injustice on the carriers who in good faith invested significant resources in the design and con-

struction of their paging operations, and further delays service to the public.

Indeed, the FCC's application processing freeze, together with its unlawful reduction of a 931 MHz paging licensee's interference contour, may constitute a "taking" within the meaning of the just compensation clause of the Fifth Amendment. See MacDonald, Sommer & Frates v. Yolo County, 477 U.S. 340, 91 L.Ed 2d 285, 106 S. Ct 2561 (1986); Hodel v. Irving, 95 L.Ed 2d 668, 107 S.Ct 2076 (1987); Loretto v. Teleprompter Manhattan CATV Corp., 485 U.S. 419, 73 L.Ed 2d 868, 102 S.Ct 3164 (1982). There is no set formula for determining where regulation ends and taking begins, but courts consider the economic impact of the regulation, its interference with reasonable investment-backed expectations, and the character of the government action as having particular significance. See MacDonald 477 U.S. 340.

In this instance, paging licensees have planned their systems based on the existing rules, investing significant resources in trying to bring service to the public. For the Commission to hamstring the completion of these systems in mid-stream jeopardizes the paging businesses of these licensees, stranding their investment. This constitutes clearcut interference with reasonable investment-backed expectations, without giving these licensees the benefit of a completed rulemaking. If the Commission continues down this road, it will be raising a taking issue under the Fifth Amendment.